SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

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October Term, 1968

No. [redacted] 188

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered and rendered in the above-entitled case on October 10, 1966, to which a petition for rehearing was denied on May 8, 1968.

CITATIONS TO OPINIONS BELOW

The order of dismissal of the United States District Court, Southern District of Florida, in the case of Inter-Continental Promotions, Inc. v. William B. MacDonald, Jr., and New Amsterdam Casualty Company, No. 65-2-Civ-EC dated April 7, 1965, is unreported, appears in the record at pages 130-133, and is printed in Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit dated October 10, 1966, is officially reported at 367 F. 2d, 293 (1966) appears in the record at pages 143-165, and is printed in Appendix B hereto, which also includes Judgment and Order Denying Rehearing.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, since the matter involved is controlled by the local law of Florida and the appellate courts of Florida have not determined this question of local law which deals with the public policy of the State of Florida and is, therefore, a matter of such importance that it justifies the exercise of the discretionary certiorari power.

QUESTION INVOLVED

Whether the United States Circuit Court of Appeals for the Fifth Circuit ought to initially construe and interpret a state statute in advance of a construction thereof by the courts of the State, especially where a matter of state public policy is involved and the procedural machinery exists to obtain a ruling on state law by the highest court in the state?

STATEMENT OF THE CASE

Muhamad Ali (Cassius Clay) and Charles "Sonny" Liston on February 25, 1964 engaged in a world championship prize fight at the Miami Beach Convention Hall, Miami Beach, Florida. The respondent brought suit in the United States District Court for the Southern District of Florida against the petitioners for the recovery of the purchase price of "certain promotional rights" sold by the respondent to William B. MacDonald, Jr., as disclosed by a contract attached to and made a part of the complaint (R. 5-12).

The attached agreement recites that the respondent "has an exclusive contract with Charles "Sonny" Liston, Heavyweight Boxing Champion of the World, and Cassius M. Clay, Jr., number one contender, for the staging of a Heavyweight Championship Bout between Liston and Clay (R. 5).

The respondent agreed "to produce Charles 'Sonny' Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, . . . at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest with each other for fifteen rounds or less, for the Heavyweight Boxing Championship of the World" (R. 6).

The respondent granted MacDonald the right and privilege to promote, stage and handle "the live gate aspect" of the fight (R. 6). The respondent agreed to post $100,000 bond to be paid to MacDonald "if either of said fighters fail to appear and to fight at the agreed time . . . " (R. 7). The respondent agreed to save Mac-

Donald harmless "with respect to the fighters' share of the live gate receipts" (R. 7). MacDonald agreed "for and in consideration of" respondent's "sale of said live gate rights to MacDonald" to pay to the respondent the sum of $625,000 (R. 7).

The fighters were to be made available to MacDonald for promotional purposes prior to the fight "having due consideration to the obligation of said fighters to train in preparation for said contest" (R. 9).

All receipts from televising and broadcasting the bout, and all receipts from moving pictures shown throughout the World were to be retained by the respondent (R. 9). It was agreed that the respondent would have no expense in connection with the promotion of the live gate "except for the payment of the fighters . . . ; each fighter shall bear his own training camp expenses." (R. 10-11).

The complaint alleges that the respondent fully complied with the contract. In other words, the fight was held by MacDonald. The live gate produced $224,695.83, leaving a deficit from the contract price of the live gate of $404,304.17 (R. 3), for which the respondent asked judgment, with interest.

The petitioners moved to dismiss the complaint on the ground that the complaint failed to state a claim upon which relief could be granted and upon the ground that the contract sought to be enforced is illegal (R. 20).

The petitioners contended that the prize fight promoted and held on Tuesday, February 25, 1964, at the

Miami Beach Convention Hall by the respondent and MacDonald constituted a violation of Florida Criminal Statutes 548.01, 548.02 and 548.03. Excerpts of the Florida Statutes cited herein are attached and printed as Appendix C.

Section 548.01 denounces the fight as a felony; Section 548.02 denounces the aid or participation in such fight as a felony; Section 548.03 defines the conduct condemned as follows:

> "By the term 'pugilistic exhibition, encounter, or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money . . . "

This definition of the conduct condemned by the statute is for the purpose of differentiating between the condemned conduct and certain conduct not condemned, as set forth in the proviso clause of said section as follows: "provided that nothing contained herein . . . shall be construed as applying to boxing exhibitions held by and under the auspices of the American Legion" and other oganizations such as the YMCA, the Veterans of Foreign Wars, etc.

The deposition of Mr. Garland D. Cherry was taken on February 25, 1965 (R. 81). Mr. Cherry is and was the attorney for the respondent at all times involved in this litigation. He is the secretary of the respondent corporation and a stockholder (R. 83). The deposition was filed on or prior to the 8th day of March, 1965 (R. 125).

After the petitioners' motion to dismiss was filed on January 25, 1965 (R. 20), the respondent, as a matter of course under the rules, on January 28, 1965, filed an amendment to its complaint, which set forth:

> "Said contract concerned the holding and conducting of a pugilistic contest which was to be held on February 25, 1964 between Charles 'Sonny' Liston and Cassius M. Clay, Jr. Said contest was held by and under the auspices of the Veterans of Foreign Wars of the United States and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract." (R. 26-27)

Thereafter, on February 15, 1965, on the regular motion calendar of the trial court, the motion to dismiss was orally argued by counsel for the respective parties. The cause was then again set for oral argument on the regular motion calendar of the trial court on March 15, 1965, and was again orally argued. On April 8, 1965, the trial court rendered its judgment, or order of dismissal (R. 130-133), in which the court found that the fight held by MacDonald and the respondent at Miami Beach violated Sections 548.01 and 548.03 of the criminal statutes of Florida.

The trial court disposed of the amendment filed by holding:

> "In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations." (R. 132)

From this judgment of dismissal the respondent took its appeal to the United States Court of Appeals for the Fifth Circuit.

DECISION IN THE COURT BELOW

The United States Court of Appeals for the Fifth Circuit, by divided court, reversed the trial court and held that the Florida Legislature had "to legalize all prize fights, even title bouts—provided, of course, that the fight was held under proper auspices," and thereby reversed the final judgment of dismissal rendered by the district court. Circuit Judge Coleman, dissenting, said: "I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a question of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion."

The Hon. Emett C. Choate, the District Judge rendering the opinion dismissing the complaint (R. 130-133) is from the Florida Bar and practiced as an eminent member thereof for many, many years, and "special weight" should be accorded "to his statement of what the [Florida] law is." *Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 76 S. Ct. 273, 277.*

Circuit Judge Wisdom is from the Louisiana Bar (New Orleans); Circuit Judge Coleman is from the Mississippi Bar, and the third member of the panel, District Judge Sarah Hughes is from the Texas Bar.

In view of Judge Wisdom's elaboration of the historical background of prize fights, glove contests and boxing exhibitions, petition for rehearing filed November 12, 1966 (R. 174-193), denied May 8, 1968 (R. 195), demonstrated that the Florida Statutes condemning prize fights as felonies grew out of a bitter contest between the Governor of the State of Florida and promoters of a fight between "Gentleman Jim" Corbett, heavyweight champion of the United States, and Charley Mitchell, champion of England, which occurred in Jacksonville, Florida on January 25, 1894. It is clear from the circumstances surrounding the enactment of Sections 548.01, 548.02 and 548.03 that the purpose of the statutes was to condemn heavyweight championship fights such as the one between Muhamad Ali and Charles "Sonny" Liston.

In addition to the petition for rehearing the petitioners filed a motion for rehearing en Banc (R. 169-172) and a request for the certification of the novel questions involved in the interpretation of these statutes to the Supreme Court of Florida, in view of the fact that there are "no controlling precedents in the decisions of the Supreme Court of Florida . . .". This motion was apparently never ruled on by the court below.

REASON FOR GRANTING THE WRIT

The Supreme Court of the United States in *United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 82 S. Ct. 676 (1962)*, vacated a judgment of the Circuit Court of Appeals initially interpreted certain state legislation. In so doing, the Supreme Court said:

> "The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under Ala. Code, Tit. 7, §§ 156-168 (1940), avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest. See Leiter Minerals, Inc., v. United States, 352 U.S. 220, 228-229, 77 S. Ct. 287, 1 L. Ed. 2d 267. Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts. It is so ordered. * * *"

In the case of *Albertson et al. v. Millard, 345 U.S. 242, 73 S. Ct. 600*, the Supreme Court of the United States sent the case to the state court for an interpretation of state legislation.

In the case of *Clay v. Sun Insurance Office Limited, 363 U.S. 207, 80 S. Ct. 1222 (1960)*, the Supreme Court of the United States vacated a judgment of the Court of Appeals of the Fifth Circuit and required that the case be sent to the Supreme Court of Florida to obtain from that court an interpretation of Florida Statute 95.03.

In the case of *Aldrich v. Aldrich, 375 U.S. 75, 84 S. Ct. 184 (1936)*, the Supreme Court of the United States certified to the Supreme Court of Florida a question of Florida law that was determinative of the cause then before the Court.

As pointed out by the District Judge in the case at bar, if the exemptive clause of the criminal statute is to be given the force and effect contended by the Circuit Court of Appeals for the Fifth Circuit, then a serious constitutional question becomes involved of whether the exemption offends the Constitution of the United States because of an unreasonable classification of the persons exempted from the statute.

The statutes involved are criminal statutes. They deal with felonies. They reflect the public policy of the State of Florida as promulgated by its legislature. The first fatality that occurs during a prize fight in Florida would evoke a hue and cry for prosecutions under these statutes. If their effectiveness or meaning is to be curbed or postulated by judicial interpretation then, under the rule of law enunciated by the Supreme Court of the United States, the question should be presented to the Supreme Court of Florida for its initial interpretation.

It is respectfully submitted that in this case the Supreme Court of the United States is again squarely presented with the issue and has the opportunity to bring to an end the hesitancy and diffidence of the United States Court of Appeals to submit questions of local law to the Supreme Court of the state involved. It is a matter of the gravest significance to the relationship between the state and federal judicial systems, under the doctrine established in *Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817*, that a writ of certiorari be issued in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and the judgment of the United States Court of Appeals for the Fifth Circuit should be vacated and the cause forthwith remanded for submission on the questions of State law to the State Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed first class, postage prepaid, to Mallory H. Horton, 308 Concord Building, Miami, Florida 33130, attorney for respondent, Inter-Continental Promotions, Inc., this day of June, 1968..

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ———

APPENDIX A

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
No. 65-2-CIV-EC
INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff,
-vs-
WILLIAM B. MacDONALD, JR., and
NEW AMSTERDAM CASUALTY COMPANY,
Defendants.

Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,
Respondent.

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

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This matter came on before the Court on the Motion to Dismiss filed by the defendant herein. This action arose upon a contract between the plaintiff and the defendant MacDonald dated December 19, 1963 for the promotion of a "Heavyweight Championship Fight." The defendant New Amsterdam Casualty Company issued a surety bond on January 13, 1964, which bond agreed to pay plaintiff the difference between $625,000.00 and the amount of the "live" gate up to Three Hundred Thousand Dollars ($300,-000.00).

The fight was held at Miami Beach, Florida, as contracted for between Charles "Sonny" Liston and Cassius Clay. The defendant MacDonald is alleged to have paid $224,695.83 to the plaintiff, who seeks $400,304.17 from him and the full amount of the performance bond, $300,-000.00 from the defendant New Amsterdam in accordance with the bond. The defendant moved to dismiss on the grounds that the contract in question is in violation of state law and therefore unenforceable.

Florida Statute Section 548.01 (1963) provides that:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine not less than two thousand five hundred, nor more than five thou-

sand dollars, or by imprisonment for not more than five years.

Section 548.03 defines a pugilistic exhibition as —

By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of theUnited States, Spanish-American war veterans, or companies or detachments of the Florida national guard,Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.

It is a Florida law that a contract in violation of a State statute is void and unenforceable. *Schaal v. Pace,*

135 So. 2d 252 (Fla. App. 1961); Local No. 234 v. Henley & Beckwith Inc., 66 So. 2d 818, 821, (Fla. 1953).

In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations.

Moreover, the Court is of the opinion that the provision purporting to exempt stated organizations from the operation of the statute is of doubtful constitutionality, even if applicable in the instant case, which it is not. The exemption provision would extend the privilege of presenting "boxing exhibitions or fights" to certain citizens while denying it to others, without a reasonable basis for classification in violation of the equal protection provision of the Fourteenth Amendment of the Constitution of the United States. See *Morey v. Doud, 354 U.S. 457 (1957).*

It is obvious that a "heavyweight championship fight" as called for in the contract is within the statutory definition of prohibited activity. The contract being in violation of state law, it is therefore

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss should be and the same is hereby granted with prejudice.

DONE AND ORDERED at Miami, Florida, this the 7th day of April, 1965.

EMMETT C. CHOATE

UNITED STATES DISTRICT JUDGE

cc: Marion E. Sibley, Esq.
David D. Phillips, Esq.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22685

INTER-CONTINENTAL PROMOTIONS, INC.,
Appellant,

versus

WILLIAM B. MacDONALD, JR., and
NEW AMSTERDAM CASUALTY COMPANY,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(October 10, 1966.)

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

WISDOM, Circuit Judge: Before a small crowd in Miami Beach, Florida, February 25, 1964, Cassius Clay (Muhammad Ali) knocked out "Sonny" Liston in the seventh round of a lackluster prize fight for the heavyweight championship of the world. Inter-Continental Promotions, Inc. owned both fighters. William B. MacDonald, the on-the-scene promoter, had agreed to pay Inter-Continental $625,000 for the live gate rights. Unfortunately

for MacDonald, the gate receipts amounted to only $225,000. He turned over this amount to Inter-Continental. Inter-Continental sued for the balance. MacDonald and his surety now say that it was illegal to promote a prize fight in Florida, and that the contract was illegal on its face. The district court, agreeing with the defendants, dismissed the complaint. We disagree.

* * * * *

The contract between the parties called for MacDonald "to stage and handle the live aspect of [the] promotion." The two opening paragraphs of the contract provide:

> 1. Inter-Continental hereby agrees to produce Charles "Sonny" Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, at an hour to be named, at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the World.
>
> 2. MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seating; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the

> controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate.

MacDonald agreed to post a bond of $300,000 insuring his performance. New Amsterdam Casualty provided this bond.

The contract required MacDonald to pay the sum of $625,000 "upon the completion of the boxing contest." At the time MacDonald made his payment of $225,000, apparently he assumed that the contract was lawful.

Inter-Continental notified New Amsterdam of MacDonald's default. New Amsterdam refused to pay the $300,000 allegedly due under the performance bond. Inter-Continental then brought this diversity action for breach of contract against MacDonald and New Amsterdam.

The defendants moved to dismiss the original complaint on the ground that Florida law makes it a felony "to voluntarily engage in" or "to render aid" in "any pugilistic exhibition, fight or encounter . . . for which an admission fee is charged"[1] except ". . . boxing exhibitions held by and under the auspices of the American Legion, disabled American veterans, veterans of foreign wars of the United States, . . ." or one of several other specifically approved organizations.[2]

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[1]FSA—§§ 548.01, 548.02.
[2]FSA—§ 548.03.

Inter-Continental moved to amend its complaint. The amendment alleges facts bringing the contract within the exception permitting "boxing exhibitions" to be held under the auspices of certain organizations:[3]

> "Said contract concerned the holding and conducting of a pugilistic contest which was to be held on February 25, 1964 between Charles 'Sonny' Liston and Cassius M. Clay, Jr. Said contest was held by and under the auspices of the Veterans of Foreign Wars of the United States and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract."

The district court did not rule on this motion for leave to amend nor refer to it in the order dismissing the complaint.

---

[3] 548.03 "Pugilistic exhibition defined . . . Provided that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling exhibitions held under the auspices of the above named organizations." This provision is not found in the original act, *Laws of Florida*, 1895, *Chapter* 4402, *section* 3, nor in *Gen.St.* 1906, *section* 3255; or *Rev.Gen.St.* 1920, *section* 5086. It was added in *Laws of Florida*, 1927, c. 12213, *section* 1; *Comp.Gen.St.* 1927, *section* 7188; *Laws* 1931, c. 14831, *section* 1935, c. 17179, *section* 1, and this was the law in this state thereafter until 1951.

The court gave two reasons for its order. First, the "contract between the parties called for the promotion of a prize fight," not a "boxing exhibition" within the meaning of the exception provided in Section 548.03. Second, even if it was a "boxing exhibition, none of the parties to the contract are within the exception provided in Section 548.03" because none is a member of any of the exempted organizations listed in that section of the law. "Nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations."

I.

There is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts. *Local No. 234 v. Henley & Beckwith, Inc., 1953, S. Ct. Fla. 66 So. 2d 818; Lassiter & Co. v. Taylor, 1930, 99 Fla. 819, 128 So. 14.* But a close look at the statute's language and legislative history compels the conclusion that the Florida legislature regards a prize fight as a "pugilistic exhibition"; a prize fight with gloves as a permissible "boxing exhibition," if it meets certain requirements.

A. Section 548 was enacted in 1895. Section 548.01 is entitled, "Prize fighting, pugilistic exhibition; penalty." It reads:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected,

> acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

The statutory definition, originally enacted without provisos, is contained in Section 548.03:

> By the term "*Pugilistic exhibition, encounter or fight,* with or without gloves as used in this chapter, *is meant any voluntary fight or personal encounter, by blows,* between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly. (Emphasis added.)

The defendants construe the definition as referring to three different kinds of pugilism: (1) exhibition, (2) encounter, *and* (3) fight. Or at least two: (1) exhibition and (2) encounter or fight. They rely on Webster's New International Dictionary (2d Ed.) to show that "fight" means "a violent physical struggle for victory" and "encounter" means "a meeting with hostile purpose." They make no reference to Webster's definition of "exhibition" as "any public show; a display as of feats of skill." By exclusion, the defendants reach the result that a "pugilistic exhibition" is not a "fight" or an "encounter" and therefore does not apply to prize fights. Since the contract refers to the contestants as "fighters" and to the match as

a "fight for the heavyweight championship," the defendants contend the subject of the contract was a "fight or encounter," not an "exhibition." The defendants assert in their brief that "the definition of the conduct condemned by the statute is for the purpose of differentiating between the condemned conduct and certain conduct not condemned, as set forth in the proviso clause of said section as follows: 'provided that nothing contained herein . . . shall be construed as applying to *boxing exhibitions* held by and under the auspices of the American Legion' " and certain other organizations. This is a patent error, for the legislature defined the condemned conduct in 1895, thirty-two years before the proviso was added to the statute. The 1927 amendment does carve out an exception for certain approved boxing exhibitions,[4] but the word "exhibition" as used in this proviso must take the meaning originally given it when Section 548.03 was enacted.

As we read the law, and as the legislature characterized the offense in the title to Section 548.01, the condemned activity is prize fighting or, more accurately, "pugilistic exhibitions." The term "prize fighting" has no technical or common law meaning. *Sullivan v. State, 1890, 67 Miss. 346 7 So. 275.* "A prize fighter," today as in 1756 when Dr. Samuel Johnson defined the words, is "one that fights publicly for a reward." The legislation prohibits one thing—public displays of pugilism for reward; not two things, (1) sparring exhibitions and (2) fights or encounters. The title to Section 548.03, therefore, is "Pugilistic exhibition defined."

[4]See footnote 3.

A simple test exposes the fallacy in the defendants' theory. If, as they argue, a "pugilistic exhibition" is something different from a "fight" or an "encounter," one should be able to arrive at the definition of pugilistic exhibition by dropping the words "encounter or fight" and that portion of the section relating only to these words. No portion of the section relates exclusively to "encounter or fight." We find, therefort, that

> "By the term pugilistic *exhibition* . . . is meant any voluntary *fight* or personal *encounter* by *blows* . . . at which an admission fee is charged." (Emphasis added.)

Pugilistic exhibitions are therefore public fights for money —in short, prize fights. The laws of some states use the term "prize fighting" or its equivalent without qualifying it. In such cases it "includes all fights of that character . . . whether witnessed by many or by few people." *Seville v. State, 1892, S.Ct. Ohio, 30, N.E. 621, 622.* Florida restricts application of the law to pugilistic *exhibitions*, that is, a "public show" or "display" of pugilism, as against private fights.

The syntax and punctuation of Section 548.03 support this construction. The statute uses the singular: one term, "pugilistic exhibition" is defined, not three terms. The phrase "*encounter or fight*" modifies and describes "pugilistic exhibition." It is set off by commas and in the disjunctive sense "*or*" is used to show that pugilistically "fight" and "encounter" are equivalents, and both are other names for "pugilistic exhibition." Of course, sports writers have always used these terms as equivalents and use them now in faultless sportese to describe "pugilistic

exhibitions" or prize fights. For the defendants' construction to be correct, the legislature should have used "*terms*" not "term"; preferred "*and*" to "or," preceded by a comma, if encounter and fight are different; and separated the definitions. If the defendants were right, Section 548.03 should start:

> The terms "pugilistic exhibition, encounter, *and* fight" mean, respectively . . .

In paragraph one of Section 548.02 the legislature does use a comma before "fight," so that all three, "exhibition, encounter, or fight" refer to one thing. In paragraph two of that section these terms are telescoped to "encounter or contest" and, finally, reduced to one word, "contest."[5]

If the defendants' construction were accepted, Section 548.03 would be meaningless. The statute would have no definitions, for "encounter" and "fight" would then be described in their own terms as a "fight or personal encounter by blows." And "pugilistic exhibition" would not be defined at all. On the other hand, the statute does make sense if it is read as stating that a "pugilistic exhibition" means "a voluntary fight or personal encounter by blows . . . for which an admission fee is charged."

To accept the notion that a pugilistic exhibition is a mere demonstration of shadow boxing or sparring, one would have to assume that the Florida legislature put such an offense on the same level as bare knuckle fight-

[5] 548.02 Second, Stakeholder, etc.; penalty

Any person who shall act as second, stakeholder, counselor or advisor, or who shall render aid of any such character, for or to the principal or either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in § 548.01.

The sheriff or his deputies in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

ing. Both offenses would be subject to a fine of not less than $2500 or more than $5000 or imprisonment for not more than five years.

B. The language of this 1895 law must be considered within the context of the times. In 1895 bare knuckle fighting was illegal in almost every state of the union. The Florida statute prohibits prize fighting with or without gloves, but the vice at which the legislation primarily was aimed was public pugilism as then distinguished from boxing.[6] From the time of the 23d Olympiad (688 B.C.) until relatively recently, pugilists fought with their bare hands, or with the caestus (a studded metal glove or wooden hand-shield with slots for the fingers), or wrapped leather thongs around their fists, or used unpadded gloves (a weapon).[7] "Pugilism (from Lat. *Pugil*, boxer) . . . (i.e. fighting with the bare fists) was driven out in favor of boxing (i.e. fighting with the glove) by public opinion and by the general adoption in 1866 of the Marquis of Queensberry rules." Encyclopedia Brittanica (1959) Verbo, "pugilism".

Until the final decade of the nineteenth century, a pugilistic "fight or encounter" meant a bare knuckle fight to the finish under London Prize Ring Rules.[8]

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[6]Before padded gloves were used in prize fights, however, "boxing" and "pugilism" were synonymous. See Egan, Boxiana: Sketches of Ancient and Modern Pugilism from the days of the renowned Broughton and Slack to the Championship of Crib (London 1818) and Miles, Pugilistica, The History of British Boxing . . . from Fig and Broughton, 1719-1740, to the last championship battle between Ring and Heenan in December 1863 (Edinburgh 1906). See also the Gentlemen's Magazine (1731-1832).

[7]I Miles, Pugilistica (Edinburgh 1906); Egan, Boxiana (1818); Menke, Encyclopedia of Sports (1944).

[8]The London rules, as drawn by Jack Broughton, and the Queensberry Rules, drawn by John Graham Chambers, are quoted in Heinz, Fireside Book of Boxing (1961) 51, 75; Menke, Encyclopedia of Sports (1944) 171, 172; Fleischer and Andre, A Pictorial History of Boxing (1959) 12. There is an excellent description of bare knuckle fighting in State v. Olympic Club, 1894, 46 La. Ann. 935, 15 So. 190. See also Egan, supra, Miles, supra, Fleischer, Heavyweight Championship (1949).

These rules permitted the fighters to wrestle, throw each other down, jump on one another, and wear three long spikes in each shoe or boot. A round lasted until one fighter fell or was knocked down or thrown to the ground. The contestants fought until one or the other was forced to stop because of exhaustion or bodily injuries. In 1889, only six years before Florida enacted Section 548, John L. Sullivan, the Boston Strong Boy, won the heavyweight championship by knocking out Jake Kilrain in a clandestine match in Richburg, Mississippi, after 75 rounds and two hours and sixteen minutes of bare knuckle fighting under the London rules.[9] That was the last *pugilistic* fight or encounter for the heavyweight title in the United States. As late as in 1929, the Encyclopedia Brittanica stated, "Boxing [is] the art of attack and defense with the fists protected by padded gloves, as distinguished from pugilism, in which the bare fists or some kind of light gloves affording little moderation of the blow are employed."[10] The first heavyweight title fight with gloves (5-ounce) and under the Marquis of Queensberry rules was not fought until 1892. In that year, in a bout held at the Olympic Club in New Orleans, Gentleman Jim Corbett knocked out John L. Sullivan in the 21st round.[11] At the time, Louisiana law (Act 25 of 1890) made prize fighting a crime, but excepted "exhibitions and glove-contests . . . within the rooms of

---

[9]See Sullivan, The Life and Reminiscens of a 19th Century Gladiator; Fleischer and Andre, supra; Fleischer, supra.

[10]Encyclopedia Brittanica, Verbo "Boxing".

[11]Corbett has vividly described his fight with Sullivan. Heinz, Fireside Book of Boxing (1961) 85.

regularly chartered athletic clubs."[12] A "pugilistic [boxing] exhibition" or "glove contest" under Marquis of Queensbury rules was what today is known as a prize fight. "Exhibition" was not used euphemistically. Corbett was one of the most skillful boxers in all prize fight history. The Sullivan-Corbett boxing contest, compared with the Sullivan-Kilrain bare knuckle fight, was an "exhibition" of the manly art of self defense. And in that sense, the Clay-Liston *entente cordiale* was also a boxing exhibition.

In 1894, the State of Louisiana sued to revoke the New Orleans Olympic Club's license on the ground that the Club held, ultra vires, "exhibitions of what is commonly called prize fighting." *State v. Olympic Club, 1894, 46 La. Ann. 935, 15 S. 190.* Reporters, lawyers, doctors, and others testified at the trial that the Sullivan-Corbett fight and similar fights were "mere exhibitions of skill in sparring with gloves, not calculated to do *great bodily* injury"; on the other hand, the Sullivan-Kilrain bare knuckle fight to the finish was a prize fight. The Louisiana Supreme Court upheld the jury's verdict that the Club's boxing matches were "exhibitions or gloved contests." "That a nose was occasionally made to bleed . . .

[12] "Act No. 25, 1890. Defining the crime of prize fighting, and to provide for the punishment thereof in and out of the state of Louisiana. Section 1. Be it enacted by the general assembly of the state of Louisiana, that any person who shall send, or cause to be sent, publish or otherwise make known a challenge to fight what is commonly called a prize fight, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight, and any such person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months and be fined not more than five hundred dollars." (Section two is omitted, as unimportant.) But to this section is appended the following proviso, to wit: "Provided this act shall not apply to exhibitions and glove-contests, between human beings, which may take place within the rooms of regularly chartered athletic clubs." 15 So. 190 at 192.

or a face somewhat bruised and disfigured, does not alter the case." *15 So. at 198.* The case was remanded on rehearing on the ground that the expert testimony was inadmissible. On the second appeal, the Court held: "Fighting in the arena of the Club, as described in the record, is prize fighting. It is preceded by the training, the challenge, the attendance of seconds, or umpires, *and of surgeons* . . . all the attendant circumstances of a contest with naked hands." *47 La. Ann. 1095, 17 So. 599, 600.*

In *Seville v. State, 1892, S.Ct. Ohio, 30 N.E. 621,* the defendant was indicted under a law making prize fighting a crime. He had engaged in a bout licensed by the local mayor as a "glove contest." The contest was allegedly held under the Marquis of Queensbury rules, but two-ounce gloves were used and the fight was to the finish. The finish came in the 17th round when one of the contestants was battered until he was unconscious. He never recovered consciousness. The Court held that the "question for the jury to decide, was whether this combat was a prize fight, not what the Queensberry rules or any other rules called it, nor what name those accustomed to such combats have given it."

In the second *Olympic Club* decision and the *Seville* decision the Courts did not decide that the fights in question were outside the scope of "boxing exhibitions" or "glove contests"; they held that such contests were prize fights. Some courts, however, have held that the "word 'fight' implies a purpose to use violence for the purpose of inflicting injury," and it is for the jury "to determine whether the defendants in fact engaged in a fight, or merely in an innocent contest." *State v. Purtell, 1896, 56*

Kans. 479, 43 Pac. 782. The "innocent contest" in that case was described as a "lawful exhibition" and a "sparring contest," but it was fought under Queensberry rules, was scheduled for 25 rounds with the referee free to continue the fight for additional rounds, and it ended with a knock-out in the 22nd round. In *Purtell* as in the first *Olympic Club* case the Court was willing to describe the contests as "exhibitions." But there is no doubt that all of these so-called exhibitions were prize fights. In the trade and in the common parlance of 1895 a pugilistic exhibition or boxing exhibition included a personal encounter by blows under rules substantially similar to those that governed the Clay-Liston boxing contest.

By 1927 the only pugilistic exhibitions that existed were boxing matches, that is, fights or encounters between contestants wearing boxing gloves and fighting under Marquis of Queensberry rules. When the match was for money or when admission was charged, the exhibition was a prize fight. The 1927 amendment legalizes these boxing exhibitions, including prize fights, when they are held by and under the auspices of certain organizations.[13]

C. Related provisions of the Florida statute clearly show that prize fights are within the 1927 exception.

At the same time the exception was enacted the legislature adopted another proviso to Section 548.03. The proviso prohibited

> "prize fights . . . for a National or International Title."

[13]See footnote 3.

In other words, prize fights for a state or local title and, indeed, all prize fights except those for a national or international title were legalized when held by the exempted organizations.

In 1951 the Florida legislature repealed the proviso relating to title bouts. In its place, the legislative substituted the following language:

> "Provided, further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling *exhibitions* held under the auspices of the above named organizations." (Emphasis added.)

The undeniable effect of the repeal of the 1927 proviso was to legalize all prize fights, even title bouts—provided, of course, that the fight was held under proper auspices. This broad scale legitimation of prize fighting created the problem whether municipalities might continue to regulate, that is, prohibit or license fights. The object of the 1951 substitute was to reassure the municipalities that the state's legalizing prize fights was not intended to curtail the police power of local authorities. Thus, both the repeal of the 1927 proviso and the enactment of the 1951 proviso show legislative recognition of the legality of prize fighting sponsored by certain organizations.

Consistent with this view, the Florida legislature in 1957 enacted Section 548.04 requiring that a physician examine a "boxer's" physical condition before the boxer enters the ring. The section reads:

> "At any *boxing, sparring or wrestling match or exhibition permitted under* § *548.03* there shall be in attendance a duly licensed physician, whose duty it shall be to observe the physical condition of the boxers or wrestlers and advise the referee or judges with regard thereto; any competent physician who has not had less than three years experience as a practitioner may be licensed. No *boxer or wrestler shall be permitted to enter the ring unless, not more than three hours before, a physician shall certify in writing that the boxer or wrestler is physically fit to engage in the proposed contest.* The physician's fee shall be paid by the licensee conducting the *match or exhibition.*" (Emphasis added.)

Section 548.04 does not limit itself to "exhibitions," but mentions "*match* or *exhibition*" in two places, refers to a "*contest*" in a third, and unquestionably applies to "a pugilistic exhibition, encounter, or fight." The substance and tone of the section belie the defendants' argument that the statute outlaws a "fight or encounter." Why a physician unless the "boxing . . . match or exhibition" exposes a boxer to the chance of receiving bodily injuries from blows exchanged in what may be an exhibition but is also a [prize] fight or encounter. As the Louisiana Supreme Court said in the second *Olympic Club* opinion, the presence of a physician (surgeon) is one of the indicia of a prize fight.[14]

The wording of Section 548.04 assumes that matches such as the Clay-Liston fight come within the "boxing exhibition" exception. Even if the exception were not

[14] 417 So. at 600.

originally intended to be that broad, it must be so read now; otherwise the two provisions of the statute would be in conflict. Of course, the conflicting provision which is last in time or last in order of arrangement prevails.

State v. City of Boca Raton, 1965, 172 So.2d 230, 233. The requirements of a physician at boxing matches is both of these and its statutory purpose, if indeed a conflict exists, must control.

D. In the sports world, as everyone who reads the sports page knows, the inelegant fault of elegant variation is the rule. This rule carries over into legislation relating to sports. In Sections 548.01 and 548.03 the Florida legislature used "pugilistic exhibition, fight or encounter" to describe a prize fight. In Section 548.02, aided by a comma, "exhibition, fight, or encounter" become an "encounter or contest" and simply a "contest." In Section 548.04 the legislature uses interchangeably the words "exhibition," "contest," and "match." In spite of the variety of expression, the statute is clear.

The contract here refers to the boxers as "fighters" five times and refers twice to the Clay-Liston contest as a "fight." But nine times the contract calls the encounter a "boxing contest," three times a "contest," two or three times a "match" or "bout." On its face, therefore, the contract itself demonstrates that it is in harmony with the Florida legislature's use of the terms "pugilistic exhibition" and "boxing exhibition" to include "boxing contest."

* * * *

Considering the wording of the Florida statute and its legislative history, we hold that a "prize fight" comes within the scope of the generic terms "pugilistic exhibition" and "boxing exhibition."

III.

The district court held that the contract was void because neither of the parties was or belonged to an approved sponsor listed in the statute, nor did the contract provide that the fight shall be held under the auspices of one of the exempted organizations. The district court apparently gave no effect to the amended complaint. The defendants argue that the amended complaint was properly dismissed, citing several circuit court cases where complaints were dismissed because the allegations were in direct conflict with the contracts sought to be enforced. *Simmons v. Peavy-Welsh Lumber Co., 5 Cir. 1940, 113 F.2d 812; Foshee v. Daoust Construction Co., 7 Cir. 1950, 185 F.2d 23;* and *Consolidated Jewelers, Inc. v. Standard Financial Corp., 6 Cir. 1963, 325 F.2d 31.* The principle of these cases does not apply to Inter-Continental's amended complaint, because that complaint in no way conflicts with the contract Inter-Continental seeks to enforce. Sponsorship of the fight by the Veterans of Foreign Wars is reconcilable with the contract even though the contract makes no mention of such sponsorship.

Schaal v. Race, Fla. App., 1961, 135 So.2d 252, urged by the defendants and cited by the district court, is not applicable. In that case, the plaintiff's original complaint alleged that the plaintiff had rendered advertising services for the defendant's political campaign under an oral contract with the defendant. Florida law required

that all remuneration for services rendered to a political campaign be authorized in writing by the campaign treasurer, and that a knowing violation of this provision was a misdemeanor. The plaintiff subsequently sought to amend his complaint by deleting the part referring to the political campaign. The court dismissed the amended complaint with prejudice, terming it a sham. The amended complaint, in effect, was a direct contradiction of the very facts alleged in the original complaint that had made the contract unenforceable. No such contradiction appears in Inter-Continental's amended complaint. The amendment is completely consistent with the facts alleged in the original complaint, and could as easily be an attempt to correct a legal oversight as a disingenuous effort to make the agreement conform to the law.

The statute requires only that the fight "be held by and under the auspices" of one of the approved groups. It does not require that the approved group be a signatory to every contract that relates to the fight. The absence of any mention of the Veterans of Foreign Wars in the contract between Inter-Continental and MacDonald is not inconsistent with the allegation that the Veterans of Foreign Wars ultimately sponsored the match. In a set of analogous cases, the courts have consistently held that if an act were illegal unless specifically approved by some governmental administrative authority, a contract to do that act would still be upheld even though the contract itself made no mention of the governmental approval. See *Lewis v. Davis, 1947, 145 Texas 468, 199 S.W.2d 146* (registration under the Texas Securities Act);[15] *Nussenbaum v. Chambers &*

[15]The parties entered a contract to form a partnership for engaging in the oil and gas business. Their projected business activities were illegal unless registered under the Texas Securities Act, and no such registration was mentioned in the contract.

Chambers, 1948, 322 Mass. 419, 77 N.E.2d 780 (approval under the Federal Wage Stabilization Act); [16] *Pennsylvania State Shopping Plazas, Inc v. Olive, ..., 202 Va. 862, 120 S.E.2d 372.* (performance of construction contract would violate zoning regulations but zoning variance possible to obtain); [17] *City of Richmond v. A. H. Ewing's Sons, Inc., 1960, 201 Va. 862, 114 S.E.2d 608* (zoning variance); *McNally v. Moser, 1956, 210 Md. 127, 122 A.2d 555* (zoning variance); and *Adamsky v. Mendes, 1950, 326 Mass. 602, 96 N.E.2d 236* (zoning variance). Several of these cases involved situations where the requisite administrative approval had not yet been received, much less mentioned in the contract. The policy even in those cases has been to hold the contract valid unless clearly invalid on its face.

> "Courts do not go out of their way to discover some illegal element in a contract or to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law." *Nussenbaum v. Chambers & Chambers, supra* at

This is not an executory contract. Inter-Continental has completely performed its part of the bargain. The potential injustice here is far greater than if neither side had performed and one of the parties were seeking to compel the other to do so. Also, the problems of

[16] The plaintiff sought to enforce an employment contract which had not been approved by the competent federal authority under the Wage Stabilization Act of 1942, and no mention of obtaining such approval had been made in the contract.

[17] "There is authority that the obligor in a contract is excused from its performance when to perform would violate zoning regulations, but the rule is not applicable where, as in the present case, the zoning laws permit a variance in the regulations and some discretion may be exercised by the proper authorities in granting a permit for a proposed use." 120 S.E.2d 372, at 375.

proof here are far less difficult. If the contract were completely executory the question of fact would be one of intention—whether or not the parties at the time of the contract intended to hold the prize fight without the proper sponsorship in violation of the laws of Florida. In the present case the difficult question of intention is not present because the fight has already been held. The only question of fact is the far simpler one of whether the fight actually was held by and under the auspices of one of the approved groups.

Even without benefit of the amended complaint, the contract is not on its face unlawful. MacDonald's obligation under the contract "to stage and handle the live aspect of the promotion" should be construed to include the burden of making arrangements for a *lawful* fight. If there is any doubt as to what the parties meant, a trial should be had, not to contradict the contract but to show what the parties meant by their contract. The defendants should not be allowed to escape from a bad bargain simply because the contract at the time it was entered into was capable of both lawful and unlawful performance. In the circumstances of this case, illegality is an affirmative defense to be raised in the answer and proved by the defendants who bear the burden of proof on this issue. The defendants raised the issue prematurely in this motion to dismiss. The plaintiffs are entitled to their day in court. (We do not reach the question whether MacDonald *could* assert invalidity as a defense where he was the party responsible for failing to bring the contest within the statutory exemption.)

As for the motion to dismiss for failure to state a claim, this Court has said many times that such a motion "should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Richland Co. v. Harper, 5 Cir. 1962, 302 F.2d 323, 325.*

We hold that the district court erred in dismissing the complaint. We direct the court to grant the plaintiff's motion to amend its complaint. We REMAND the case for a trial on the merits consistent with this opinion.

REVERSED.

COLEMAN, Circuit Judge, dissenting.

I must respectfully dissent. I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a question of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed May 8, 1968, U. S. Court of Appeals. Edward W. Wadsworth, Clerk.

No. 22685

INTER-CONTINENTAL PROMOTIONS, INC.,
Appellant

v.

WILLIAM B. MacDONALD, JR. and NEW AMSTERDAM CASUALTY COMPANY, (The Miami Beach First National Bank and Fred R. Baisden, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, substituted in the place and stead of said William B. MacDonald, now deceased).
Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(May 8, 1968)
(On Petition for Rehearing)

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22685

D. C. Docket No. 65-2-Civil Action-EC

INTER-CONTINENTAL PROMOTIONS, INC.,
Appellant,

versus

WILLIAM B. MacDONALD, JR., and
NEW AMSTERDAM CASUALTY COMPANY,
Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, William B. MacDonald, Jr., and New Amsterdam Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 10, 1966

COLEMAN, Circuit Judge, dissents.
Issued as Mandate:

APPENDIX C

Florida Statute §548.01 Prize fighting, pugilistic exhibitions; penalty.—Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundren, nor more than five thousand dollars, or by imprisonment for not more than five years.

History.—§1, ch. 4402, 1895; GS 3253; RGS 5084; GGL 7186.
cf.—§775.06, Alternative punishment.

Florida Statute 548.02 Second, stakeholder, etc.; penalty.—

(1) Any person, who shall act as second, stakeholder, counselor or advisor, or who shall render aid of any such character, for or to the principal of either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in §*548.01*.

(2) The sheriff or his deputies, in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

History.—§2, ch. 4402, 1895; GS 3254; RGS 5085; CGL 7187.

Florida Statute 548.03 Pugilistic exhibition defined. —By the term "Pugilistic exhibition, encounter or fight, with or without gloves" as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.

SUPREME COURT, U. S.

FILED

JUL 12 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 188

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

-vs-

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1526

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr. deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

-vs-

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

BRIEF OF RESPONDENT

JURISDICTION

The Petitioners seek to invoke, but improvidently, the jurisdiction of this Court under §1254, Title 28, United States Code. No basis for this invocation is stated except the Petitioners' unsupported conclusion that the matter involved is controlled by the local law of Florida which had not been construed by the appellate courts of Florida.

QUESTION INVOLVED

The Respondent submits that the question involved is whether there exists a federal constitutional question, which is dependent upon a determination of an uncertain issue of state law.

STATEMENT OF THE CASE

The Petitioner's statement of the case is substantially correct but omits certain salient aspects of the agreement sued upon, to-wit:

> "(2) MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seating; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." (R. 6)

Further, in paragraph 9 of said agreement, is the following:

> "(9) MacDonald agrees to indemnify and save harmless Inter-Continental from any and all liability arising out of the acts of neglect of him-

self, his agents, servants, employees, or independent contractors, or from any other liability arising out of the staging of said live gate promotion." (R. 8-9)

The pugilistic contest was held on February 25, 1964, (R. 26-27) and the agreement or contract completely performed by Respondent (R. 3). The United States Court of Appeals for the Fifth Circuit reversed the trial court on two bases: (1) the contract was not unlawful on its face because it was capable of being performed lawfully and that the defense of unlawfulness was an affirmative defense to be raised by Petitioner's answer; and (2) that the complaint should not have been dismissed for failure to state a claim unless it appeared to a certainty that the Respondent would be entitled to no relief under any state of facts which could be proved.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The Petitioners, after the opinion and decision of the Court of Appeals had been handed down, then conceived the idea of requesting that Court to obtain from the Supreme Court of Florida an interpretation of the statutes involved. See Rule 4.61, Florida Appellate Rules. That an interpretation of the Florida Statutes is unnecessary and no federal constitutional question exists which is dependent upon such interpretation, the Respondent will hereinafter seek to demonstrate.

Federal courts are vested with discretion to invoke or decline to invoke the so-called doctrine of abstention. This doctrine is usually invoked by federal courts postponing the exercise of their jurisdiction in deference to state

court resolutions of underlying issues of state law. See RAILROAD COMMISSION v. PULLMAN CO., 312 U. S. 496, 85 L.Ed. 971, 61 S.Ct. 643. This is especially true where the resolution of a federal constitutional question is dependent upon or may be materially altered by the determination of an uncertain issue of state law. However, the doctrine contemplates that deference to state court adjudications be made only where the issue of state law is uncertain. DAVIS v. MANN, 377 U.S. 678, 690, 12 L. Ed.2d 609, 616, 84 S.Ct. 1453; McNEESE v. BOARD OF EDUCATION, 373 U.S. 688, 673-674, 10 L.Ed. 2d 622, 626, 83 S.Ct. 1433; CHICAGO v. ATCHISON T. & S.F. R. CO., 357 U.S. 77, 84, 2 L.Ed.2d 1174, 1180, 78 S.Ct. 1063.

Federal jurisdiction of the action sub justice was based upon a diversity of citizenship. No federal constitutional question was raised in the trial court. The unenforceability of the agreement sued upon under the terms of the Florida Statute covering prize fights was the main issue urged by the petitioners in the trial court. Consequently, the issue as to the construction to be placed upon the state statute covering prize fights was not necessary to the decision of any federal constitutional question for the very simple reason that no such issue was posed to the trial judge or to the Court of Appeals. In HARMAN v. FORSSENIUS, 380 U. S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965), this Court said:

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of

the federal court to exercise its properly invoked jurisdiction. Baggett v. Bullitt, 377 U.S. 360, 375-379, 12 L.Ed.2d 377, 387-389, 84 S. Ct. 1316."

It can be readily seen, first, that the state statute in question is not so vague and uncertain as to require a resolution by a state tribunal, and secondly, that a federal constitutional question is not dependent upon a state court construction. The discretion is vested in the federal courts to remit relevant issues to state courts where the decision upon a relevant state statute would affect, modify, or materially alter a determination of the underlying federal constitutional question. The petitioners have not demonstrated to this Court what the federal constitutional question is that may be affected by a state court construction of the Florida Statutes. As a matter of fact, it is not even claimed that such a question existed in the case in the trial court or in the Court of Appeals. The mere fact that the public policy of the State of Florida may be involved in the construction of the Florida Statutes and the further fact that procedural machinery is provided to obtain a ruling on state law from the highest court of the State of Florida, does not justify a federal court in abdicating or staying the exercise of its jurisdiction for the purpose of obtaining an abstract opinion on a non-controlling issue.

Petitioners have cited this Court to its opinion in UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., 369 U.S. 134, 82 S.Ct. 676 (1962) wherein the Court was concerned with the interpretation of the License Code of the City of Mobile, Alabama. A close examination of this case will disclose that there was an underlying federal constitutional question, to-wit: the imposition of a tax

under the License Code of the City of Mobile on what was claimed to be interstate commerce. If the Alabama court determined that the License Code of the City of Mobile was unconstitutional as placing a burden upon interstate commerce, or was otherwise invalid, then the issue before the federal court would have been resolved. However, if the issue was decided by the Alabama courts to the contrary, that is to say, that the License Code of the City of Mobile was not unconstitutional, then the federal courts would have been in a position to determine whether or not the License Code violated the interstate commerce clause of the Federal Constitution. The case sub judice and UNITED GAS PIPE LINE CO. v. IDEAL CEMENT CO., are not analogous on the facts nor do they pose analogous points of law.

The Petitioners also cite this Court to its opinion in ALDRICH v. ALDRICH, 375 U.S. 75, 84 S.Ct. 184 (1936), as an example of the certification of a state law to the Supreme Court of Florida. The ALDRICH case was a certiorari to this Court to review a West Virginia judgment that denied full faith and credit to a Florida divorce decree insofar as the decree made the ex-husband's estate liable for alimony accruing after his death. The underlying question was whether or not the West Virginia courts had accorded full faith and credit as they were required to do under the Federal Constitution to the Florida judgment. This Court certified the matter to the Supreme Court of Florida in order to obtain a ruling from that tribunal on the question relating to the permissibility and conclusiveness of the divorce decree under the domestic law of Florida. Obviously ALDRICH v. ALDRICH, supra, involved the underlying federal constitutional question then pending before a federal tribunal and was dependent to

a great extent upon a determination of state law on the question of whether or not the Florida divorce decree was final. If it was final, then the federal courts would determine whether or not the West Virginia courts had failed to accord the decree full faith and credit under the Federal Constitution. No such question exists in the case sub judice.

The doctrine of abstention is invoked at the discretion of the federal tribunal in which the cause of action is pending. Therefore, unless it is shown that the federal court has abused its discretion in failing to invoke the doctrine, then certiorari should not lie. Such an abuse has not been made to appear. The petitioners seem to suggest that the doctrine established in ERIE R. CO. v. TOMPKINS, 304 U.S. 64, 58 S.Ct. 817, is applicable to the case sub judice because of the grave significance arising from the relationship between the state and federal judicial systems. It is further suggested that there is a hesitancy and diffidence on the part of the United States Court of Appeals to submit questions of local law to the highest courts of the states involved and that this hesitancy and diffidence should be brought to an end by this Court's granting certiorari. We respectfully submit that the courts of appeal have never been hesitant or diffident in submitting such issues to the state tribunals where the construction to be placed upon the state law involved would have a bearing upon, modify, alter or even determine the underlying federal constitutional question. No claim is made in this cause that such a federal constitutional question exists.

The petitioners contended in the trial court and the Court of Appeals that the Florida Statute covering prize

fights was valid and should be construed to render unenforceable the agreement between the parties. No effort was made in the trial court to obtain a construction of the Florida Statute and it was only after the decision and opinion of the Court of Appeals had been handed down did it occur to the petitioners that a construction of the statute was necessary or expedient.

CONCLUSION

Based upon the foregoing authorities and argument in support thereof, the petition for certiorari should not be granted and the judgment of the United States Court of Appeals for the Fifth Circuit should not be disturbed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent has been mailed to MARION E. SIBLEY, ESQ. and ROBERT C. WARD, ESQ., Attorneys for Petitioners, 605 Lincoln Road, Miami Beach, Florida 33139, this 10 day of July, A. D., 1968.

s/ Murray Adams Jr

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 188

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

REPLY BRIEF

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OTHER AUTHORITIES:	
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1526

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, substituted in the place and stead of said William B. MacDonald, Jr., now deceased, and NEW AMSTERDAM CASUALTY COMPANY,

Petitioners,

vs.

INTER-CONTINENTAL PROMOTIONS, INC.,

Respondent.

REPLY BRIEF

The respondent is critical of the petitioners' request to the Court of Appeals that it certify under Rule 4.6 of the Florida Appellate Rules to the Supreme Court of Florida the question of the interpretation of the statutes involved after the lower court had announced its opinion of reversal. The procedure adopted by the petitioners is identical with that outlined and followed by the United States Court of Appeals, Fifth Circuit, in the case of *Edwin Green, Jr., etc. v. American Tobacco Company,*

304 F. 2d 70 (1962). There are much more cogent reasons for the certification of the action sub judice than appear in the *Green case*, supra. Petitioners pointed out in the first ground of the petition for rehearing (R. 174-193) that the lower court's opinion of reversal was largely predicated on matters not argued in the briefs in the lower court.

It is true in the case at bar that federal jurisdiction was invoked upon a diversity of citizenship. However, in the case of *United Gas Pipe Line Co. v. Ideal Cement Co., 369 U. S. 134, 82 S. Ct. 676 (1962)*, federal jurisdiction was also based upon diversity of citizenship.

The delay incidental to disposing of the petition for rehearing in the lower court, filed on November 10, 1966 (R. 174-193), denied by the lower court on *May 8, 1968* (R. 195; App. B-1), is a much longer period than would have likely been required to procure a judgment and decision from the Supreme Court of Florida upon certification under the Rule.

The decision by the lower court projects a federal constitutional question into the law suit. This was pointed out by the trial court in its opinion in which the District Judge stated:

> "In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations.

Moreover, the Court is of the opinion that the provision purporting to exempt stated organizations from the operation of the statute is of doubtful constitutionality, even if applicable in the instant case, which it is not. The exemption provision would extend the privilege of presenting 'boxing exhibitions or fights' to certain citizens while denying it to others, without a reasonable basis for classification in violation of the equal protection provision of the Fourteenth Amendment of the Constitution of the United States. See Morey v. Doud, 354 U.S. 457 (1957)." (App. A-4; R. 132)

If the case is returned to the trial court under the decision of the Court of Appeals, the question of whether or not the amendatory act of 1927 to *Section 548.03, Florida Statutes* is unconstitutional because of the denial of equal protection of the law or faulty classification under the Fourteenth Amendment to the Constitution of the United States, must be faced and decided by the trial court. See, *State v. Calhoun County, 127 Fla. 304, 170 So. 883.*

We respectfully urge that this case should be certified to the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed first class, postage prepaid, to Murray Sams, Jr., 7th Floor, Concord Building, Miami, Florida 33130, attorney for respondent, Inter-Continental Promotions, Inc., and Messrs. Horton & Schwartz, 308 Concord Building, Miami, Florida 33130; Hansford D. Tyler, Jr., 303 Biscayne Building, Miami, Florida 33130; David D. Phillips, 609 Biscayne Building, Miami, Florida, 33130, of counsel for respondent aforesaid, this _____ day of July, 1968.